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THE SUPREME COURT OF THE CONFEDERATE
STATES OF AMERICA.

History Thesis

Dr. R. C. McDanel

Robert W. Ferrell

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BIBLIOGRAPHY

1. A Bill: Entitled An Act to Amend an Act entitled 'An Act to establish the Judicial Courts of the Confederate States of America' approved 16th of March, 1861. Bill 20 (Private Calender, No. 9), original by courtesy of the Confederate Museum, Richmond, Va.
2. Journal of the Congress of the Confederate States of America, 1861-1865, Five volumes. 58 Congress, 2 sessions., Senate Document 234, Government Printing Office, Washington, 1904.
3. Mathews, James M.--The Statutes at Large of the Provisional Government of the Confederate States of America. From the Institution of the Government, February 18, 1862, Inclusive.
R. M. Smith, Printer to Congress,
Richmond, 1864.
4. Tyler, Wise, Allegre, and Smith, Company. --Acts and Resolutions of the First Session of the Provisional Congress of the Confederate States, Held at Montgomery, Alabama.
Enquireer Book and Job Press,
Richmond, Va., 1861.
5. Tyler, Wise, Allegre, and Smith, Company. --Acts and Resolutions of the Second Session of the Provisional Congress of the Confederate States, Held at Montgomery, Alabama.
Enquireer Book and Job Press,
Richmond, Va., 1861.
6. Tyler, Wise, Allegre, and Smith, Company. --Acts and Resolutions of the Third Session of the Provisional Congress of the Confederate States, Held at Richmond, Virginia.
Enquireer Book and Job Press,
Richmond, Va., 1862.
7. Tyler, Wise, Allegre, and Smith, Company. --Acts and Resolutions of the Fourth Session of the Provisional Congress of the Confederate States, Held at Richmond, Virginia.
Enquireer Book and Job Press,
Richmond, Va., 1862.

BIBLIOGRAPHY CONT'D.

8. Century Edition of the American Digest, A Complete Digest of all Reported American Cases from the Earliest Times to 1896.
Vol. 13, West Publishing Company, St. Paul, 1899.
9. Johnson, Bradley T.--"Why The Confederate States Did Not Have A Supreme Court."
(Southern Historical Society Papers, Volume 27.
Wm. Ellis Jones, Printer, Richmond, Va., Published by the Society, 1899.
10. Daily Richmond Enquirer, 1861-1865.
11. Daily Dispatch of Richmond, 1861-1865.
12. Owsley, F. L. --State Rights in the Confederacy.
University of Chicago Press,
Chicago, Ill., 1925.
13. Curry, J. L. M. --Civil History of the Government of the Confederate States with some Personal Reminiscences.
B. F. Johnson Publishing Co.,
Richmond, Va., 1901.
14. Richardson, James--A Compilation of the Messages and Papers of the Confederacy Including the Diplomatic Correspondence 1861-1865. 2 vols.
O., comp.
United States Publishing Co.,
Nashville, 1905.
15. Rowland, Dunbar --Jefferson Davis Constitutional-ist: His Letters, Papers, and Speeches. 10 vols.
Collector & Editor
Printed for the Mississippi Department of Archives and History, Jackson, Mississippi, 1923.

The Supreme Court of the Confederate States
of America.

Much has been written about the military history of the Confederate States of America, but comparatively little has been recorded regarding the civil status of the form of government behind the armed forces. This fact might be explained in many ways, upon which however we will not endeavor to expatiate, our purpose being to investigate only one phase of the civil government which has received very little attention from historians, namely, the judicial system of the Confederate States culminating in its Supreme Court.

Just as it is the practice of human beings to judge one another by the appearances, content, and abilities of that portion of the body known as the head, so will we by investigation of the Supreme Court be able to form some judgement of the judicial system set up by the revolting Southern States. Does not the name Supreme Court imply in itself the status of that Court in the field of government pertaining to Law and Justice? Therefore it will be our aim to set aside for discussion only one unit of the Judicial System, rather than to wander around in the limitless fields of research relating to the whole organization. The seceding states, faced with the problem of setting up some form of government, even though it be provisional,

held a convention in Montgomery, Ala., February 4, 1861.¹ The deputies of six states were present, South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana^h being represented.² After a hasty organization, the convention adopted a constitution almost identically the same as that of the United States, thus carrying out the idea that these states withdrew not from the Constitution but from the "injurious perv^{er}sions of the compact". This constitution was of the nature of a provisional compact which would serve until a permanent one could be drawn up. In one respect this document differed greatly from the Constitution of the United States, in that it provided for only one legislative body.³ The sections pertaining to the judicial system were practically the same. The provisional government, thus established, was to remain until the expiration of one year's time after the inauguration of the President or until a permanent Constitution or Confederation between the States, mentioned above, had been put into operation. Whichever happened first would serve to put an end to the provisional government. The bond of relationship was adopted February 9, 1861.

The election followed. Each State had one vote, and there was no electioneering for any candidate. Jefferson

¹--J. L. M. Curry, Civil History of the Confederate States with some Personal Reminiscences, 42.

²--Ibid

³--Ibid

Davis was elected to the Presidency on the weight of his experience as a former Secretary of the War Department and as a member of Congress of the United States, his two opponents, Cobb and Toombs being less experienced in governmental service. Mr. Stephens of Georgia was elected to serve as Vice-President. President Davis selected a very able cabinet whose personnel was as follows; Toombs as Secretary of State, C. G. Memminger as Secretary of Treasury, L. P. Walker as Secretary of War, S. R. Mallory as Secretary of the Navy, J. P. Benjamin as Secretary of the Department of Justice, and John H. Reagan as the head of the Post Office Department.

On the election day of the President and Vice-President, a committee was appointed to draw up a Constitution for a permanent government. Mr. R. Barnwell Rhett, of South Carolina, was selected to act as chairman of this committee, which was made up of two representatives from each state.⁴ A report was brought in February 26, 1861 and without any appreciable delay the framework of the government, suggested by the committee, was adopted and immediately ratified on March 11. The form of the permanent government thus provided for, was also very similar to the type in existence in the United States, the committee having followed the outline and even the body of the latter's constitution in many respects. It is interesting to compare these

⁴ Ibid, 63.

parallel documents, but being limited in the scope of this paper, we will mention only those principles, embodied in the Constitution of the Confederate States of America, which are not in the Constitution of the United States, and which might throw some light on the attitude and ideas of the leaders of the Seceeding States in regard to the government they were seeking to establish. The adopted constitution recognized the equality and sovereignty of the individual Confederate States, the derivative character of the Confederacy, the limitations upon the powers of the general government, and provided for restrictions to prevent aggressions and usurpations by the central government. The ideas thus expressed in the very formation of the body politic, go far toward explaining the attitude later adopted concerning the establishment of a Supreme Court.

In section eight of the first article of the constitution, we find among the listed powers of Congress the first reference to the Supreme Court, giving Congress the right "to constitute tribunals inferior to the Supreme Court". Article two, section two, referring to the rights of the President, reads, "he shall nominate by and with the advice and consent of the Senate -----, shall appoint ambassadors -----, judges of the Supreme Court," Article three, section one, provides "The judicial power of the Confederate States shall be vested in one Supreme Court,

and such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." This section, except for the substitution of the word "Confederate" instead of "United States", is the same as the relative section in the constitution of the United States.

Section two of that same article sets forth the jurisdiction of the Supreme Court. "The judicial power shall extend to all cases arising under this constitution, the laws of the Confederate States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the Confederate States shall be a party; to controversies between two or more States; between a State and citizens of another State, where the State is plaintiff; between citizens claiming lands under grants of different States; and between a State or the citizens thereof, and foreign states, citizens or subjects" Here, too, except for the word "Confederate", the relative sections are identical. It is interesting to note that the last sentence of section 3 of this article, "But no State shall be sued by a citizen

or subject of any foreign State", or rather the same idea, was embodied in the eleventh amendment of the Constitution of the United States. According to the other sections of this article, the Supreme Court was to have original jurisdiction in those cases in which an ambassador, minister, consul, or State, was a party, and appellate jurisdiction in all other instances designated by the section. Such were the provisions providing for the judicial system of the Seceding States.⁵

President Davis in his inaugural address at Richmond, February 22, 1862, said, "The Courts have been open, the judicial functions fully executed, and every right of the peaceful citizen maintained as securely as if a war of invasion had not disturbed the land".⁶ At the opening of the second session of the Provisional Congress, April 29, 1862, in his message the President had said, "To the Department of Justice you have confided not only the organization and supervision of all matters connected with the courts of justice, but also those connected with patents and with the bureau of public printing. Since your adjournment all the courts, with the exception of those of Mississippi and Texas, have been organized by

⁵ Ibid, 283

⁶ Inaugural Address, in Richardson, A Compilation of the Messages and Papers of the Confederacy Including the Diplomatic Correspondence, 1861-1865, 11, 185.

the appointment of marshals and district attorneys and are now prepared for the exercise of their functions."⁷ From these two statements we can draw the conclusion that the organization of the lower courts was promptly set under way, and, before the provisional government gave way to the real government, had been fairly well established. But what of the Supreme Court? No reference was made to the highest of the courts.

By investigating the annals of the Provisional Congress we find that on February 12, 1861, a standing committee on the Judiciary was appointed. It was composed of five men, Messrs. Clayton, Withers, Hale, Cobb, and Harris.⁸ This body, headed by Mr. Clayton, reported back to Congress February 22, 1861, a bill to establish the judicial courts. Forthwith it was ordered to be printed and made the special order for the Monday session following. At which time consideration of the bill entitled "An Act to establish the judicial courts of the Confederate States of America" was postponed for some time.⁹ February 25, the bill was discussed and a few minor changes were made in its content.¹⁰ Again on March 12, the bill was considered in sections but this time in secret session,

⁷ Message to Congress, *ibid*, 78.

⁸ Journal of the Congress of the Confederate States of America, 1861-1865, 144.

⁹ *ibid*, 74.

¹⁰ *Ibid*, 80.

the discussion pertaining in general to the establishment of district courts.¹¹

March 13, the act was further discussed, particularly those sections providing for the Supreme Court. An attempt was made to make a few minor changes in the forty-fifth section but it was not successful. That section reads, "Be it further enacted, that a final judgement or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the Confederate States; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the Confederate States; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute, or commission held under the Confederate States; in each of these cases the decision may be reexamined and reversed or affirmed in the Supreme Court of the Confederate States, upon a writ of error, the citation being signed by any judge of the said Supreme Court in the same manner and under the same regulations and with the like effect as if the judgement or decree complained of had been rendered or passed in a district court of the Confederate States; and the proceed-

¹¹ Ibid, 127.

ing upon reversal shall be the same, except that the Supreme Court, instead of remanding the cause for a final decision may, at their discretion, if the cause shall have once been remanded before, proceed to a final decision of the same and award execution. But no other error shall be assigned or regarded as ground of reversal in any such case as aforesaid than such as appears in the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute." ¹²

The Bill, amended in minor details, was passed March 13, 1861 and received the President's approval three days later. In reviewing the act, we look for those sections concerned with the establishment of the Supreme Court. They are as follows: Section 1, The Supreme Court is to hold an annual meeting, at the seat of the government, commencing the first Monday of January and continuing until business be disposed of. Section 2. Each Confederate State is to make up one district, each district to have a district court presided over by one judge. Section 38. Where accused is to be either killed or put in the penitentiary, the case may be reviewed before the Supreme Court upon writ of error or appeal. Section 40. Civil

¹² Ibid, 136.

cases may be appealed to Supreme Court upon writ of error. Section 44 provides that the Supreme Court is to have "original jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or citizens of any other State or nation. It shall also have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their servants, as a court of law can have or exercise consistently with the law of nations, and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the Confederate States shall be by jury, and it shall have power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the Confederate States."

Section 47, while not pertaining to the Supreme Court, does concern the District Courts. It states that the papers, dockets, etc., of the judicial proceedings of the United States District Courts shall be turned over to the Confederate District Courts and that these Courts shall fulfill the incomplete proceedings of the former Court's judgements according to the lights of the law and procedure of the United States District Courts at the time of the judgements.

In the same tone, Section 49, declares that the Confederate Supreme Court shall carry into effect and shall execute such judgement or decrees, according to the mandate of the United States Supreme Court, as if no dissolution of the Union had taken place, in all cases where decrees or judgement had been made by the latter body and which remained in force and unexecuted. Continuing along this line, section 53 reads, "From all judgements or decrees which shall be rendered in causes pending in the courts of the United States at the time of the secession of the States in which they were, and which causes shall be transferred to and decided by the Courts of this Confederacy, writs of error or appeal may lie to the Supreme Court of this Confederacy, when the sum or matter in controversy exceed the sum of two thousand dollars." ¹³

Thus, did the Provisional Congress in the act "To establish the Judicial Courts of the Confederate States of America" outline the functions of the Supreme Court, but failed, at the same time, to make any provisions for the make-up of the Court. As we proceed, we shall see how this body and the Congress of the succeeding government at Richmond continued to periodically busy itself making provisions for the functioning of the Court which it failed to actually establish. True it is that the system of lower

¹³ Tyler, Wise, Allegre, and Smith, Acts and Resolutions of the First Session of the Provision Congress of the Confederate States, Held at Montgomery, Alabama, 115-130.

courts was set up, but the Court, to which cases from these courts were to be appealed, never existed save in name only.

Mr. Hale, from the committee on the Judiciary, on May 18, reported a bill to be entitled, "An Act supplemental to An Act to establish the judicial courts of the Confederate States of America." The bill was read and placed on the calendar.¹⁴ On May 21 it was passed and received the President's approval.¹⁵

Two sections of that act referred to the Supreme Court. Section 2 stipulates, "When any appeal or writ of error was pending in any of the late circuit courts of the United States, from any of the late district courts of the United States, and the judge of the present district court to which such appeal or writ of error is transferred, is the same person who rendered the decree of judgement from which such appeal or writ of error was taken, then such appeal or writ of error shall be transferred to the Supreme Court of the Confederate States, upon the party giving bond and surety, as required by law in case of an appeal or writ of error sued out to said Supreme Court. And an authentic copy of the record, under the seal of the district court, shall be sent along with such bond to the said Supreme Court, which court shall thereupon proceed to hear and determine the same, as in other cases."

¹⁴ Journal of the Congress of the Confederate States of America, 1861-1865, I, 189.

¹⁵ Ibid, 196.

Section 6 of this same act referred back to the 48th section of "An act to establish the Judicial Courts of the Confederate States of America" which provided for cases pending in the Supreme Court of the United States upon appeal or writ of error, from any court of the now Confederate States, to be heard by the Supreme Court of the Confederacy. Section 6 reads as follows, "The forty-eighth section of the act to which this is a supplement shall be and the same is hereby amended, so as to permit either party to file the transcripting, the record, and copy of the bonds, as therein required, in the Supreme Court of the Confederate States, without dismissing the appeal or writ of error in the Supreme Court of the United States, where the said court refuses to dismiss the same upon motion; and that the said section be also amended so as to allow the period of twelve months from the time of the organization of the Supreme Court of the Confederate States for filing such transcript and bond, instead of the time in said section prescribed." 16

July 29, Mr. Waul of Texas introduced a bill to amend further the act passed March 13. This bill was referred to the Judiciary Committee. As a result, on July 31 an Act further to amend "An Act to establish the Judicial Courts of the Confederate States of America" was passed. It stated in Section 1, "The Congress of the Confederate

16 Tyler, Wise, Allegre, and Smith, Acts and Resolutions of the Second Session of the Provisional Congress of the Confederate States, Held at Montgomery, Alabama, 96-97.

States of America do enact, That so much of the act approved March 16, 1861, entitled "An Act to establish the Judicial Courts of the Confederate States of America", as directs the holding of a session of the Supreme Court of the Confederate States in January next, be, and the same is hereby repealed; and no session of the Supreme Court shall be held until that Court shall be organized under the provisions of the Permanent Constitution of the Confederate States, and the laws passed in pursuance thereof."

In section 2, "All writs of error and appeals taken or prosecuted from the District Courts of the Confederate States, prior to the organization of the Supreme Court, under the Permanent Constitution, shall be returnable on the second Monday of the first term to be held by the Supreme Court, after its establishment under the Permanent Constitution."

In section 3, "It shall be lawful for the Clerks of the several Districts Courts to issue writs of error under the seal of said District Courts, returnable to the Supreme Court, in the same manner, as nearly as may be, as the clerk of the Supreme Court may, by law, issue such writ and with the same force and effect as if issued by said Clerk of the Supreme Court." 17

In this manner did the Provisional Congress seek to

17 Tyler, Wise, Allegre, and Smith, Acts and Resolutions of the Third Session of the Provisional Congress of the Confederate States, Held at Richmond, Va., 6.

insure the functioning of the lower courts despite the lack of the head of the judicial system. There was no hint that the Supreme Court would not be established, to the contrary there was every expectation expressed in this bill that the permanent government would set up this Court very soon after it took over the duties of the Provisional government.

Another bill entitled "An Act to amend an Act entitled 'An Act to establish the Judicial Courts of the Confederate States of America' " approved 16th of March, 1861, was read the first and second time and placed on the calendar December 23, 1861. It stipulated "The Congress of the Confederate States of America do enact, that causes pending in the Supreme Court of the United States at the date of the Passage of the above entitled Act on appeal or writ of error from a Court of the Several States, then composing the Confederate States, or causes pending at the date of the admission of any State of States, subsequently acceding to the Confederate States, from such States, may be prosecuted by the appellant or plaintiff in error, if he be a citizen of the States of the Confederate States, in the Supreme Court of the Confederate States, on such appellant or plaintiff in error filing the transcript of the records of such cause from the inferior Court, in the said Supreme Court, and the same proceeding shall be had

in such causes, as though said cause had been brought regularly before said Supreme Court in the first instance. Provided, however, That such transcript shall be filed within one year from the passage of this Act. "And in section 2, "So much of the 48th section of the Act, to which this is an amendment, as requires the appellant or plaintiff in error in the causes aforesaid to dismiss the cause in the Supreme Court of the United States within twelve months, is hereby repealed." 18

By this outline of the year's legislation concerning the Supreme Court, we can understand why no mention of that body, was made by President Davis in his inaugural address at Richmond on February 22, 1862 when he officially took office in the Permanent Government. In fact one is inclined to be sceptical regarding his quoted statement, made that day to the effect that the courts were open and the judicial functions fully executed, if one interprets it broadly.

At the beginning of the year of 1862 an act had been passed relative to the establishment of some district courts but nothing was done in the Congress regarding the Supreme Court until the latter part of February. 19

18 A Bill: Entitled An Act to Amend an Act entitled "An Act to establish the Judicial Courts of the Confederate States of America" approved 16th of March, 1861.

19 Tyler, Wise, Allegre, and Smith, Acts and Resolutions of the Fourth Session of the Provisional Congress of the Confederate States, Held at Richmond, Va., 98-99.

In that month the Senate received a letter from the President inviting attention to the duty of that body to organize a Supreme Court as mandated by the Permanent Constitution.²⁰ Spurred on by this request for action, the Judiciary Committee of the Senate brought in a proposed bill to organize the Supreme Court on March 11.²¹ It was placed on the calendar and printed. The Senate acting as a committee of the whole, on March 26, considered the document, but postponed further action. No definite steps were taken by this body on the bill during the year except for a superficial consideration of its provisions on September 26th and 27th, after which time the question was postponed again.

During the same year, The House of Representatives attempted to fulfill the request for action sent by President Davis.²² A bill to organize the Supreme Court was presented to the House, April 10, but was referred to the Judiciary Committee after being read.²³ On September 17, 1862 a resolution was passed that the committee on the Judiciary be instructed to report a bill for the establishment of a Supreme Court.²⁴

²⁰ Message to Senate, in Richardson, op. cit., 11, 192.

²¹ Journal of the Congress of the Confed. States of America, 1861-1865, IV, 204.

²² Message to House, in Richardson, op. cit.

²³ Journal of the Confederate States of America, 1861-1865, IV. 204.

²⁴ Ibid, 391

Among other standing committees, appointed January 19, 1863, was a new Committee of the Judiciary in the Senate composed of Messrs., Hill, Haynes, Phelan, Semmes, and Caperton. ²⁵ It was probably due to their efforts that the bill, drawn up for the purpose of organizing a Supreme Court, was repeatedly thereafter brought before the Senate until some final action was obtained. The bill was considered January 26, 27, and 28th. On the last date Mr. Clay proposed an amendment to the act approved March 16, 1861, which repealed sections 45 and 46, of that act. After much discussion further consideration of Mr. Clay's amendment was postponed. ²⁶ Then there followed a period of repeated postponements of the question on the amendment, which was to be included if passed as a separate, independent, clause of the new bill. Finally on March 18, 1863 the amendment passed by a vote of 16 to 6. The bill was then engrossed and read to the senate and question being called, passed by a vote of 14 to 8. ²⁷ The act entitled, "Bill to organize the Supreme Court of the Confederate States of America" was as follows: Section 1. "The Congress of the Confederate States of America do enact, That hereafter the Supreme Court of the Confederate States shall consist of a Chief Justice and three Associate Justices, and three of whom shall constitute a quorum and shall hold

²⁵ Ibid, III, 23

²⁶ Ibid; 34

²⁷ Ibid, 177.

annually, at the seat of Government, two sessions, the one commencing the first Monday of January, the other the first Monday of August, the respective sessions to continue until the business of each session shall be disposed of."

Section 2, "Be it further enacted, That the Chief Justice shall be the presiding Judge of the Court, and the Associate Justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages."

"Section 3. "Be it further enacted, That the Justices of the Supreme Court, before they proceed to execute the duties of their respective offices shall take the oath or affirmation prescribed by law for the Judges of the District Courts."

"Section 4. "Be it further enacted, That the Chief Justice shall receive an annual salary of seven thousand dollars and the Associates Justices shall each receive an annual salary of six thousand, the said salaries to be payable quarterly out of the Treasury."

"Section 5. "Be it further enacted, That all the records, papers, appeals, and writs of error and judicial proceedings of any kind, appertaining to any suit now pending in or returnable to the Supreme Court created by the Provision Congress be, and the same are hereby, transferred to the Supreme Court created by this act, and shall stand in the

same plight and condition in which they were at the date of the passage of this act, and the Supreme Court to which said causes are hereby transferred shall proceed to hear and determine the same according to law, as if said causes had been originally instituted or made returnable therein." 28

The bill, as quoted with the additional clause amending or repealing the 45th and 46th sections of the "Act to establish the judicial courts of the Confederate States of America", was then turned over for the concurrence of the House. The public feeling concerning the bill is best expressed by a news item in the Daily Richmond Enquirer of March 19, 1863. "The Senate yesterday passed by a large majority the bill to repeal those clauses in the judiciary act, which would have operated to confer an appellate jurisdiction on the Supreme Court of the Confederate States over the Courts of the States respectively.--This repeal has been, as we think wisely made: and the only genuine and safe basis of the Confederacy--namely State Sovereignty, thereby lifted high above all danger of question. The bill now goes to the House, where we hope to see it passed by as great majority." 29

March 19, The House received the message from the Senate informing it of the latter's approval of this bill

28 News Item in Daily Dispatch of Richmond, March 19, 1863.

29 News Item in Daily Richmond Enquirer, March 19, 1863.

and asking for the concurrence of the House.³⁰ The following day this body referred the act to its Committee on the Judiciary which reported back the 9th of April, recommending the passage of the bill with an amendment. After some discussion further consideration was postponed.³¹ December 16, the bill was brought up again for consideration but again it was postponed. It did not make its appearance before the House again until May 5 and November 18, 1864, at which times it was referred back to the Committee on the Judiciary. Finally, on March 14, 1865, upon a motion made by Mr. Russell, the bill was laid on the table where it remained until the downfall of the Confederate Government.³²

Now that we have reviewed all the available data concerning the legislation which passed and some which failed to pass in the Congress of the Confederate States of America, providing for the establishment of the Supreme Court, let us ask the question why did the Confederacy never have this court? Of course the simplest answer is, a Supreme Court was never set up by its supposed creator, the Congress. But surely there must be some tangible reasons why this or these bodies, making up the Congress, failed to fulfill the mandates of the Constitution. For as you remember, both constitutions definitely provided

³⁰ Journal of the Congress of the Confederate States of America, 1861-1865, V. 189.

³¹ Ibid, 320.

³² Ibid, 758.

for a Supreme Court which was to be established according to the dictates of Congress. We must admit that the Provisional Government, through the agency of its one-bodied legislature, made a few feeble attempts to set up a complete judicial system but failed miserably to provide for the essentials necessary for the establishment of the corner stone of the system, namely, the Supreme Court. Like the biblical character who built his house upon the shifting sands, so did these legislators construct their house of Law and Justice without the rock foundation of a Supreme Court. In reply to this, some might say, in all truthfulness, the provisional Congress stipulated under what conditions and in what manner cases were to be appealed to this utterly fictitious court. But we can attach no importance to this argument since no action was taken to set up this court, so that it could function according to the legislated requirements.

Little more can be said of the so-called permanent Congress, which followed in the footsteps of its predecessor in the main, except in the cases of one of its parts, the Senate. This body did, as we have seen, pass an act to establish the Supreme Court of the Confederate States of America, but with what results? The bill was ultimately lost in the House of Representatives.

Let us look beyond the more apparant causes for the

failure to organize a Supreme Court. We can not find an answer to our query in the writings of Jefferson Davis, of Mr. Stephens, or of others, for all of these studiously avoided any mention of the subject. Being thus shut out from the revealing ideas of such leaders of the Confederacy, we must fall back upon rationalization in our effort to solve the riddle.

The Supreme Court of the United States had, under the leadership of John Marshall, developed a very strong centralizing influence. Since 1788-89 the States Rights Party had opposed at every possible step the growth in power and importance of this "common arbiter". Jefferson and Madison had raised the cry of infringement of States' Rights by a common agent, the central government. They maintained the State or States involved alone should judge and settle matters under dispute, not the Supreme Court. In the Kentucky resolutions drafted by Mr. Jefferson in 1798, we find expression of the idea "that the several States, composing the United States of America, are not united on the principle of unlimited submission to their general government, but that by compact under the style and title of the Constitution of the United States, and by amendment thereto, they constitute a general government for special purposes, delegated to that government certain definite powers reserving to each State for itself the residuary mass of right to their own self-government, and that whensoever the

General Government assumes undelegated power, its acts are unauthorized, void, and of no force; that to this compact each State acceded as a State, and is an integral part; that the government created by this compact was not made the exclusive judge of the power delegated to itself, since that would have made discretion, and not the Constitution, the measure of its own powers; but as in all cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infraction as the mode and measure of redress." ³³

On this platform, Thomas Jefferson was elected to the presidency in the year 1800. From that time until 1861, this idea remained as a plank in the Democratic Party, which was the dominant political group in that period of American History. But the Supreme Court, following the course laid down by John Marshall, continued to enlarge its delegated powers, until many people lost sight of the nature of the union. The State Rights advocates, headed by John C. Calhoun, fought every step of the way for their proposition which ultimately had untold influence in 1860.

The Confederate States wanted to have anything but subh an influence in their government. They feared that the appointment of a "common arbiter" by their agent, the Confederate Government, would result in the defeat of the

³³ Bradley T. Johnson, "Why The Confederate States Did Not Have A Supreme Court." Southern Historical Society Papers, XXVII, 311.

very principles for which they were fighting. Rather than create a Frankenstein, these States neglected to establish a Supreme Court.

Another reason, which we cannot fail to consider in attempting to answer the question, involves a study of the conditions of civil life in the Confederate States during the period from 1861-1865. These States were in the throes of a mighty struggle which taxed every resource of their existence. Their main interest was warfare and would remain such until they gained defeat or victory. Other less important interests would have to wait for consideration, or more thorough consideration, until hostilities were over. In this category can be placed the question of a Supreme Court. For in times of war very few cases come before a nation's highest tribunal, as the annals of the United States Supreme Court will testify. During this same period, the Court, just mentioned, was comparatively inactive. We can understand then why in the Confederate States the need for such a body was not pressing enough to demand its establishment. The state and the district courts, together with the martial court, constituted the judicial system. Such cases as would be reviewed by a Supreme Court of the central government, were very few due to the prevailing conditions.

With the close of the Civil War, the United States Government reestablished its judicial system throughout the South, giving little attention to the courts set up

by the Confederate Government other than to declare their establishment and functioning null and void.³⁴ No attention was given to the Supreme Court of the Confederate States of America, since that tribune had no material existence outside of the brains of its few supporters.

Today, we find reference to this body only on rare occasions, for the succeeding years have all but washed away from the sands of time the slight traces of the attempt to create this Court.

³⁴ Century Edition of the American Digest, XIII, section 205.